In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 942

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS IN PART

The motion to dismiss concedes (p. 2) that the issue raised by the appeal concerning the scope of the exemption which the Capper-Volstead and Clayton Acts accord to agricultural cooperatives from the prohibitions of Section 2 of the Sherman Act "merits this Court's review", but prays (p. 12) that so much of the appeal as is based upon alleged inadequacy of the relief granted by the judgment below be dismissed.

Appellees' motion to dismiss is not authorized by the rules of this Court. The rules permit a motion to dismiss in a federal case only for alleged defect in the Court's appellate jurisdiction. As stated in Rule 16(a), the only ground for a motion to dismiss an

511307—59

appeal from a judgment of a federal court is that the appeal is not within the jurisdiction of this Court, "because not taken in conformity to statute or to these rules". The motion to dismiss does not challenge the appeal upon any such ground.

Assuming, however, that the motion to dismiss may appropriately be considered as an attempt at this preliminary stage to delimit the scope of plenary appellate review by this Court, we believe it should be rejected. This is plainly not a case where, at this posture of review, it could be said that any of the grounds for appeal is frivolous or patently insubstantial. On the contrary, as we show below, the issues raised as to the adequacy of the relief are clearly substantial. As the motion itself recognizes (p. 2), these questions of relief will not be reached by the Court if it should sustain the appellee's claim on the merits that its acquisition of the Embassy assets was exempt from antitrust prosecution. In the circumstances, we suggest that the Court should decline appellee's invitation to adjudicate the merits of the appeal, as concerns relief, at this stage.

In civil Sherman Act proceedings brought by the Government, this Court has always recognized that the measure and scope of relief granted by the judgment, following an adjudication of violation, may be, and usually is, of critical importance. Upon this may depend whether "the Government has won a lawsuit and lost a cause". *International Salt Co.* v. *United States*, 332 U.S. 392, 401. As the Court stated in *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571, "it is unthinkable that Congress has

entrusted the enforcement of a statute [the Sherman Act] of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." The cases in which this Court has reviewed questions of relief in Sherman Act proceedings are legion. Indeed, in several instances the opinion rendered shows that the Court regarded the relief questions as far overshadowing in importance any questions of substantive violation.[1]

The relatively cursory consideration given by the district court (Holtzoff, J.) to questions of relief underlines the need for appellate review thereof. There was no separate hearing for the taking of evidence on relief. The court's two opinions holding the Embassy acquisition illegal directed counsel to submit a proposed judgment (App. 898, 31a, 34a),[2] and opposing parties did submit widely different proposed judgments, which were considered at a hurried hearing of less than an hour and a half.[3] Early in the

[1] See *United States* v. *National Lead Co.*, 332 U.S. 319 (substantive violation, pp. 325–328; relief, pp. 328–364); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (substantive violation, pp. 400–401, 406–407; relief, 408–435); *International Boxing Club* v. *United States*, 358 U.S. 242 (substantive violation, pp. 249–252; relief, pp. 253–263). In *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, review was confined to relief.

[2] We use the designation "App. No. 898" to refer to the appendix to the appellant's jurisdictional statement in *Maryland and Virginia Milk Producers Assn.* v. *United States*, No. 898, this Term.

[3] At the hearing the court said (Tr. 957): "Gentleman, we are spending an awful lot of time on this. I have a jury case on trial, and I interrupted it for this. Let's move along a little more expeditiously."

hearing the court said that it would adopt the defendant's draft judgment as the basis for its decree,[4] and the judgment which it signed at the end of the hearing was this draft, with the interlineations and excisions made by the court during the course of the hearing (Tr. 975).

As to the specific relief issues raised by the appeal, we believe the following brief analysis will suffice to show their substantiality:

(a) *Assets Required to be Divested.* The court below found that appellee's acquisition of Embassy was made "with the intent and purpose of restraining trade", and that it resulted in "a foreclosure of competition" with respect to Government contracts and purchases of milk from milk producers (Supp. No. 898, 32a). It is necessary that the dairy unlawfully acquired be divested under conditions which will permit it to become a vigorous, independent retail distributor if the judgment is to "undo as near as may be the wrongs that were done" (*United States* v. *Griffith*, 334 U.S. 100, 109). Accomplishment of this end may largely turn on the physical plant and equipment to be divested. But the present judgment, as construed by appellee (Motion 7), limited divestiture to assets "so incorporated into the Embassy operation that the business cannot be sold as a going dairy concern without them". This would mean that a potential purchaser might not obtain post-acquisition

[4] The court said (Tr. 944): "Now, gentlemen, it seems to me that I ought to use the Defendant's draft as a basis for my decree. I rather like the form of the Defendant's draft anyway."

additions and improvements made to keep abreast of technological progress, and that what he would be offered would be opportunity to enter the 1960–1961 marketplace with a dairy of a 1954 vintage.

(b) *Operation of Another Dairy.* The current volume of Embassy's business would be a material factor in its value to a purchaser and in the viability of Embassy following purchase. The court itself was of the opinion that operation of another dairy pending divestiture of Embassy would "impair Embassy" (Tr. 929), but declined to frame its judgment so as to guard against such impairment (Tr. 929–930). Likewise, the marketability of Embassy's assets and its ability to survive would be adversely affected if, immediately following divestiture, appellee were free to operate a dairy and recapture its Embassy customers. On sale of a business, a covenant by the seller not to compete for a specified time is a common practice, and when appellee acquired Embassy it incorporated such a covenant, for a 10-year period, in the contract of acquisition (Govt. Ex. 29). While the judgment which the Government submitted to the district court proposed a 10-year ban on appellee's operation of a dairy, the Government's position is that the ban should be for a reasonable time (J. St. 15). If this Court should be persuaded that such relief should be granted, it might well leave to the district court determination of what would be a reasonable period for the ban. See *Gypsum Co., supra,* 340 U.S. at 94.

(c) *Injunction Against Future Acquisitions.* We deny the assertion (Motion 9) that in the district court the Government abandoned its request for re-

lief against future acquisitions. In view of the fact that the district court, after some initial consideration of the Government's proposed judgment, announced that it would base its decree on the defendant's proposed draft and in view of the court's request to counsel to proceed more expeditiously (see fns. 3 and 4, *supra*), the Government's failure to argue the future-acquisition point, which is similar in principle to other proposed relief rejected by the court (Tr. 929-930), cannot be regarded as "abandonment". The question whether appellee should be prohibited, for a reasonable period of time,[5] from acquiring a dairy without obtaining court approval upon a showing that the acquisition will not unreasonably restrain competition, presents a question of substance. Appellee's acquisition of any of the limited number of dairies operating in the Washington Metropolitan area, when appellee controls 86% of the fluid milk sold in that area, would give rise to at least dangerous probability of a violation of the antitrust laws. In these circumstances, absence of a pattern of past illegal conduct is not determinative.

(d) *Visitation Rights.* We believe this matter is sufficiently covered in our jurisdictional statement, and merely add that information provided in reports which appellee is required to file with the court are in no sense a substitute for opportunity to obtain, from an examination of appellee's records, facts bearing

[5] The Government would be satisfied with a prohibition of this kind running for a reasonable period, which might be considerably less than the 20 years proposed in the judgment which it submitted to the district court.

upon its compliance with the district court's judgment, and particularly facts bearing upon "good faith" compliance. The *Bethlehem Steel* proceeding, to which appellee refers, was a totally different situation in that it stopped a proposed merger in its incipiency and did not, as here, involve the complications necessarily inherent in terminating and undoing a consummated acquisition.

CONCLUSION

It is respectfully submitted that the motion to dismiss part of the appeal should be denied.

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